

Before the  
Federal Communications Commission  
Washington, D.C. 20554

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In the Matter of	)	EB Docket No. 02-21/
	)	
Peninsula Communications, Inc.	)	
	)	File No. EB 01-IH-0609
Licensee of stations	)	FRN: 0001-5712-15
KGTL, Homer, Alaska;	)	Facility ID Nos. 52152
KXBA(FM), Nikiski, Alaska;	)	86717
KWVV-FM, Homer, Alaska; and	)	52145
KPEN-FM, Soldotna, Alaska.	)	52149
	)	
Licensee of FM translator stations <sup>1</sup>	)	52150
K292ED, Kachemak City, Alaska;	)	52157
K285DU, Homer, Alaska;	)	52158 and 52160
K285EG and K272DG, Seward, Alaska	)	
	)	
Former licensee of FM translator stations <sup>2</sup>	)	
K285EF, Kenai, Alaska;	)	
K283AB, Kenai/Soldotna, Alaska;	)	
K257DB, Anchor Point, Alaska;	)	
K265CK, Kachemak City, Alaska;	)	
K272CN, Homer, Alaska; and	)	
K274AB and K285AA, Kodiak, Alaska	)	

**ORDER TO SHOW CAUSE**

**Adopted: February 1, 2002**

**Released: February 6, 2002**

By the Commission:

1. In this Order, pursuant to Sections 312(a), 312(c) and 503(b) of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. §§ 312(a), 312(c) and 503(b), we commence a hearing proceeding to determine whether the above-captioned licenses held by Peninsula Communications, Inc. ("Peninsula") should be revoked. Peninsula has continued to operate the seven captioned unlicensed FM translators following our warning that continued unauthorized operation might lead to possible

<sup>1</sup> The captioned licensed translators are currently operating in accordance with the Commission's rules. However, as explained below, because Peninsula continues to operate the seven captioned formerly licensed translators subsequent to a direct order from us to cease such operations, the captioned translators are now subject to possible revocation.

<sup>2</sup> We include the stations formerly held by Peninsula as part of our revocation proceeding to cover the eventuality that the D.C. Circuit could ultimately reinstate their licenses. Should those licenses be so reinstated, the conduct discussed in this order raises serious questions whether Peninsula should be entitled to continue as licensee.

revocation of all of Peninsula's Commission licenses.<sup>3</sup> Such operations not only violate Section 301 of the Act, 47 U.S.C. § 301, but also are in blatant disregard of our prior order to terminate such operations,<sup>4</sup> and thus in apparent violation of Section 416(c) of the Act. Peninsula's continued refusal to obey a direct Commission order, which has not been stayed or otherwise modified, calls into question Peninsula's fitness to remain a Commission licensee. See 47 U.S.C. § 312(a)(2) and (a)(4). See also *Policy Statement on Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986) ("*Character Policy Statement*") (subsequent history omitted). Moreover, as explained herein, our order to terminate operations on the seven translators continues to be valid, and Peninsula is obligated to comply with it.

## DISCUSSION

2. The background of this case is discussed at length in the *NAL* and related *Forfeiture Order* issued in connection with Peninsula's violation of Section 301 of the Act.<sup>5</sup> In our *May 2001 MO&O*, the Commission ordered Peninsula to cease operating seven FM translator stations. It is undisputed that Peninsula has not complied with our order. Peninsula has indicated that it intends to continue to operate despite the Commission's order until the D.C. Circuit rules on its appeal of the *May 2001 MO&O*.<sup>6</sup>

3. Peninsula has argued that it is justified in continuing to operate despite the Commission's order pursuant to sections 1.62 and 73.3523 of the Commission's rules, 47 C.F.R. §§ 1.62 and 73.3523, because its renewal applications are still "pending." We disagree. As a preliminary matter, we note that even if the rules did permit Peninsula to continue operation, a licensee cannot ignore a Commission order simply because it believes such order to be unlawful. As the Act specifically provides:

All such orders shall continue in force for the period of time specified in the order or until the Commission or a court of competent jurisdiction issues a superseding order.<sup>7</sup>

It shall be the duty of every person, its agents and employees, and any receiver or trustee thereof, to observe and comply with such orders so long as the same shall remain in effect.<sup>8</sup>

In any event, neither rule cited by Peninsula authorized it to continue broadcasting after the date

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<sup>3</sup> See *Peninsula Communications, Inc.*, Notice of Apparent Liability for Forfeiture and Order, 16 FCC Rcd 16124 (2001) ("*NAL*").

<sup>4</sup> See *Peninsula Communications, Inc.*, 16 FCC Rcd 11364 (2001) ("*May 2001 MO&O*"). This day we also release a *Forfeiture Order* (FCC 02-31), which imposes a forfeiture of \$140,000 on Peninsula for its willful and repeated violations of Section 301 of the Act, resulting from the continued operation of the unlicensed translators.

<sup>5</sup> See notes 3 and 4, *supra*.

<sup>6</sup> See Declaration of David F. Becker, President, Peninsula Communications, Inc., filed September 10, 2001. Peninsula filed this sworn declaration in response to the Commission's order that it do so. See also *Peninsula Communications, Inc. v. FCC*, Case No. 01-1273 (D.C. Cir. June 15, 2001).

<sup>7</sup> 47 U.S.C. § 408.

<sup>8</sup> 47 U.S.C. § 416(c).

specified in the *May 2001 MO&O*. Section 1.62 of our rules provides that a renewal applicant's license "shall continue in effect ... until such time as the Commission shall make a final determination with respect to the renewal application."<sup>9</sup> Here, the Commission made such a final determination. The fact that an appeal is pending is irrelevant for purposes of section 1.62, as the Commission held in *Mobilcom Pittsburg, Inc.*, 9 FCC Rcd 509 (1994). As for 47 C.F.R. § 73.3523, the definition of a pending application on which Peninsula relies is expressly restricted by subsection (d) of that rule to the operation of that rule alone. Section 73.3523 seeks to prevent a competing applicant who filed against a renewal application from receiving "greenmail" from the renewal applicant. That rule has absolutely nothing to do with this case. Hence, neither rule provides any justification for Peninsula's continued operation of the captioned translators after the date specified in the *May 2001 MO&O* (that is, after midnight May 19, 2001).<sup>10</sup>

4. Peninsula also contends that the D.C. Circuit Court's September 6, 2001, Order,<sup>11</sup> raises questions about the finality of the *May 2001 MO&O*. We disagree. That order merely requests a status report and does not purport to find that the *May 2001 MO&O* was not a final decision as to the status of the seven FM translators. In any event, the fact that an order may not be final does not affect a party's obligation to comply with such order. Next, Peninsula argues that 47 U.S.C. § 312(g)'s mandate for the

<sup>9</sup> See also 5 U.S.C. § 558(c) (corresponding provision of the Administrative Procedure Act states that the license continues until the renewal application "has been finally determined by the agency").

<sup>10</sup> Generally, we permit a disqualified broadcast licensee to continue operations during judicial appeals to ensure service to the public until the court resolves the licensee's qualifications. See *Pinelands, Inc.*, 7 FCC Rcd 6058, 6061 n. 12 (1992). In those situations, when we choose to allow licensees to continue operations, we do so explicitly. See, e.g., *Contemporary Media, Inc.*, 13 FCC Rcd 14437, 14461 (1998). In our *May 2001 MO&O*, we did not give Peninsula continued authority to operate. We also note that, in light of the record, it would have been inappropriate for us to do so. As discussed in the *May 2001 MO&O* and *NAL*, Peninsula received in November 1997 conditional grants of renewal and assignment applications to remedy rule violations that had been ongoing since June 1, 1994. At the outset, Peninsula accepted and endorsed the conditional grants as fair and consistent with the facts and the law. See *May 2001 MO&O*, 16 FCC Rcd at 11368. However, by the time of the *May 2001 MO&O*, Peninsula had failed to fulfill the condition, namely, consummating the assignment of its FM translator licenses, despite having years to do so and despite our explicit warning that not doing so would result in cancellation of those licenses. See *Peninsula Communications, Inc.*, 15 FCC Rcd 3293 (2000) ("*February 2000 MO&O*"); *May 2001 MO&O*. Moreover, the record further demonstrated beyond doubt that Peninsula would never fulfill the condition. In light of these circumstances, granting Peninsula authority to continue to operate its FM translators during the pendency of any judicial appeals of the *May 2001 MO&O* would have perpetuated long-standing rule violations and been inconsistent with the warning in our *February 2000 MO&O*. We saw no reason to do either. We had given Peninsula ample time to meet the condition imposed in 1997 and come into compliance with 47 C.F.R. § 74.1232(d).

<sup>11</sup> *Peninsula Communications, Inc. v. FCC*, Case No. 01-1273 (D.C. Circuit). In pertinent part, the Order requires Peninsula to "file a status report addressing whether any proceedings on the FCC's order to show cause [concerning the proposed modification of two FM translator licenses for Seward, Alaska] or any other proceedings related to the FCC's May 18, 2001 order remain pending before the FCC. The parties are directed to file motions to govern proceedings within 30 days of the filing of appellant's status report. If appellant's status report demonstrates that any proceedings on the FCC's May 18, 2001 order remain pending before the FCC, the parties should address the effect of such proceedings on the court's jurisdiction to hear this appeal." Peninsula filed the required status report on September 20, 2001. In response, we filed a "Motion to Govern Further Proceedings" on October 18, 2001. Therein, we argued that the *May 2001 MO&O* is final and appealable with respect to the seven translators whose licenses we cancelled, and we urged the Court to issue a briefing schedule. The Court has not yet acted on our motion.

cancellation of licenses for stations that remain silent for any consecutive 12-month period justifies Peninsula's continued operation pending its appeal in order to preserve those licenses. Again, we disagree. As matters now stand, the seven FM translator licenses are no longer in effect. Hence, 47 U.S.C. § 312(g), which by its terms applies to licensed stations that remain silent for one year, is inapposite. In any event, the fact that compliance with an order might negatively impact Peninsula does not justify ignoring such an order. Finally, Peninsula submits that it had a right to a hearing prior to the dismissal of its seven translator licenses pursuant to 47 U.S.C. §§ 309(e) or 312(c). Peninsula is mistaken. Peninsula had received and accepted a conditional grant of its 1995 renewal applications for the translators in 1997. Having failed to fulfill the condition despite having years to do so, Peninsula forfeited its licenses and has no entitlement to a hearing. *See P & R Temmer v. FCC*, 743 F.2d 918, 928 (D.C. Cir. 1984) (termination of license for failure to meet license condition did not require hearing). In any event, even if Peninsula wins on this argument in court, that does not justify its failure to comply with the Commission's order.

5. We have considered and rejected Peninsula's contentions. None of the rule or statutory provisions cited by Peninsula authorized in any way its operation of the translators once the *May 2001 MO&O* became effective. We did not provide for continued operation of Peninsula's translators in our *May 2001 MO&O*, and, absent a stay of that order,<sup>12</sup> Peninsula was required to terminate operations upon that order's effective date. *See* 47 U.S.C. §§ 408, 416(c). Peninsula did not do so. Instead, it has chosen to defy our order. We conclude that Peninsula's continued failure to obey our *May 2001 MO&O* belies its claim that it has acted as a conscientious and responsible broadcast licensee. We further conclude that Peninsula's defiance raises extremely serious questions as to whether Peninsula has the character qualifications to continue as a licensee, regardless of whether it ultimately prevails in court on the appeal of our *May 2001 MO&O*.

### ORDERING CLAUSES

6. Accordingly, IT IS ORDERED THAT, pursuant to Sections 312(a)(2), 312(a)(4) and 312(c) of the Act, 47 U.S.C. §§ 312(a)(2), 312(a)(4) and 312(c), and section 1.91 of the Commission's rules, 47 C.F.R. § 1.91, Peninsula Communications, Inc. is hereby ORDERED TO SHOW CAUSE why its licenses for broadcast stations KGTL, Homer; KXBA(FM), Nikiski; KWVV-FM, Homer; KPEN-FM, Soldotna; and its licenses for FM translator stations K292ED, Kachemak City; K295DU, Homer; K285EG and K272DG, Seward, all in Alaska, SHOULD NOT BE REVOKED. In the event the D.C. Circuit reinstates the licenses for former FM translator stations K285EF, Kenai; 283AB, Kenai/Soldotna; K257DB, Anchor Point; K265CK, Kachemak City; K272CN, Homer, and K274AB and K285AA, Kodiak, all in Alaska, we intend that all such licenses shall be included in this Order to Show Cause. Peninsula shall

<sup>12</sup> Peninsula observes that it filed a motion for stay of our *February 2000 MO&O*, which, it argues, we never directly addressed. It now "renews" its request that the Commission stay its *May 2001 MO&O* pending a final court determination of Peninsula's appeal. We dismiss Peninsula's request. Peninsula's request does not comply with section 1.44(e) of our rules, 47 C.F.R. § 1.44(e), which requires that stay requests be filed as separate pleadings. Moreover, our *May 2001 MO&O* modified in significant respects the *February 2000 MO&O*, thereby rendering moot Peninsula's stay request of the *February 2000 MO&O*. In any event, we note that the mere pendency of such a motion does not give Peninsula the right to disobey our direct order to terminate operations of the seven translators. We also note that an order of the 9<sup>th</sup> Circuit Court of Appeals staying a District Court preliminary injunction against Peninsula's continued operation pending Peninsula's appeal of the District Court's order (*United States v. Peninsula Communications, Inc.*, Case No. 01-35965 (9<sup>th</sup> Cir.), Order, November 21, 2001) does not affect the continuing validity of the Commission's *May 2001 MO&O*. Even if the 9<sup>th</sup> Circuit's order did have such an effect, Peninsula's defiance of the *May 2001 MO&O* continued for six months, which, by itself, would be a sufficient basis to commence this revocation proceeding.

appear before an Administrative Law Judge at a time and place to be specified in a subsequent Administrative Law Judge order and give evidence upon the following issues:

- (a) To determine the facts and circumstances surrounding Peninsula Communications, Inc.'s operation of former FM translator stations 285EF, Kenai; K283AB, Kenai/Soldotna; K257DB, Anchor Point; K265CK, Kachemak City; K272CN, Homer; and K274AB and K285AA, Kodiak, all in Alaska, subsequent to August 29, 2001, contrary to the Commission's order in *Peninsula Communications, Inc.*, 16 FCC Rcd 11364 (2001), and related violation of Section 416(c) of the Act;
- (b) To determine, in light of the evidence adduced pursuant to issue (a), whether Peninsula Communications, Inc. has the requisite character qualifications to be a Commission licensee and thus whether its captioned broadcast and FM translator licenses, including any former licenses reinstated, should be revoked.

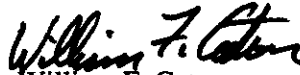
7. IT IS FURTHER ORDERED THAT, to avail itself of the opportunity to be heard and to present evidence at a hearing in this proceeding, Peninsula Communications, Inc., pursuant to section 1.91(c) of the Commission's rules, 47 C.F.R. § 1.91(c), SHALL, within thirty days of its receipt of this ORDER TO SHOW CAUSE, FILE with the Commission a written appearance stating that it will appear at the hearing and present evidence on the issues specified above. An unexcused failure to file a timely notice of appearance will constitute a waiver of such hearing, pursuant to section 1.92(a)(1) of the Commission's rules, 47 C.F.R. § 1.92(a)(1). If the hearing is waived, Peninsula Communications, Inc. may submit a written signed statement pursuant to section 1.92(b) of the Commission's rules, 47 C.F.R. § 1.92(b), which can deny, seek to mitigate or justify its unauthorized operation of the seven noted translators. In the event Peninsula Communications, Inc. waives its right to a hearing, the Chief Administrative Law Judge (or presiding officer if one has been designated) shall, at the earliest practicable date, issue an order reciting the events or circumstances constituting a waiver of hearing, terminating the hearing, and certifying the case to the Commission. See section 1.92(c) of the Commission's rules, 47 C.F.R. § 1.92(c).

8. IT IS FURTHER ORDERED THAT, pursuant to section 0.111(b) of the Commission's rules, 47 C.F.R. § 0.111(b), the Enforcement Bureau shall serve as trial staff in this proceeding.

9. IT IS FURTHER ORDERED THAT, pursuant to Section 312(d) of the Act, 47 U.S.C. § 312(d), and section 1.91(d) of the Commission's rules, 47 C.F.R. § 1.91(d), the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

10. IT IS FURTHER ORDERED THAT, pursuant to Section 312(c) of the Act, 47 U.S.C. § 312(c), a copy of this ORDER TO SHOW CAUSE shall be sent by Certified Mail Return Receipt Requested to David F. Becker, President, Peninsula Communications, Inc., Post Office Box 109, Homer, Alaska 99603, with a copy to Jeffrey D. Southmayd, Esquire, Southmayd & Miller 1220 19<sup>th</sup> Street, N.W., Suite 400, Washington, D.C. 20036.

FEDERAL COMMUNICATIONS COMMISSION



William F. Caton  
Acting Secretary